66.Do you agree that removing lead from gasoline was an important and successful EPA rulemaking? Why or why not?

I have not evaluated this issue.

67.Lead has no safe level of human exposure, particularly for children. What actions will you take to require lead to be removed from children's environment to reduce their exposure to lead in air, water, soil, and paint?

If confirmed, I will faithfully carry out the authorities granted to EPA by Congress to reduce exposure to lead.

68.In March 2016 it was reported that 19 drinking water systems in Oklahoma had elevated lead levels. Of the 100 water systems with the highest self-reported lead levels between 2013 and 2015, seven are located in Oklahoma. One exceeded the federal action level by 1,175 parts per billion - many times greater than the amount of lead needed to cause the death of a fetus or spontaneous abortion, or permanent severe developmental problems. As Oklahoma A.G., what specific actions did your office take to protect children against lead poisoning?

The Oklahoma Department of Environmental Quality and the Oklahoma Water Resources Board have primary responsibility for implementing and enforcing environmental laws in Oklahoma. Questions relating to actions taken by the State of Oklahoma with regard to lead in water systems should thus be directed to those environmental regulators.

69.How will you ensure that required evaluation of state drinking water primacy programs is conducted and how will you use EPA authority and resources to help states carry out their Safe Drinking Water Act primacy responsibilities?

If confirmed, I will focus on EPA's core missions, including oversight of state implementation of the Safe Drinking Water Act.

70.Will you direct EPA to continue and follow up on findings from 2016 increased oversight of state implementation of the Safe Drinking Water Act Lead and Copper Rule?

Yes.

71.What are your expectations for the 2017 Proposed Revisions to the Safe Drinking Water Act Lead and Copper Rule?

It is my understanding that EPA expects to issue that proposed rule in 2017.

90.You have lost many of the lawsuits challenging EPA's authorities, including the Chesapeake Bay TMDL and the lawsuit challenging the endangerment finding on greenhouse gases. Given the difficulty you've had winning cases, what assurances can you provide the committee of your sound judgment when it comes to understanding our nation's environmental statutes?

As Attorney General of Oklahoma, my focus has been on examining federal environmental statutes and relevant case law to evaluate the legality of the EPA's actions and the impact of those actions on Oklahoma. Oklahoma filed a friend of the court brief with the U.S. Court of Appeals for the Third Circuit in part to inform the court how EPA's interpretation of TMDL and other matters involved in the challenge would impact other states, including Oklahoma. If I am confirmed, I will apply those

lessons which I have developed in the performance of my duties as Attorney General and would continue to do so if confirmed as Administrator.

RANKING MEMBER CARPER

42. What impacts do mercury power plant air emissions have on unborn children? Can you explain how power plant mercury emissions settle in water bodies and eventually can impact the unborn?

Some portion of mercury emitted into the air by power plants is deposited directly or indirectly into a watershed. Once present in the watershed, it can be naturally converted into methylmercury, which can then can be absorbed by aquatic organisms, such as fish, and consumed by humans. The unborn children of pregnant women can be exposed to methylmercury if their mothers consume those fish.

72. Do you support the "not net loss of wetlands" policy? George H.W. Bush initiated this critical policy in 1988 to protect our remaining wetlands habitat and all of the critical ecological and economic functions it supports. It has been U.S. Government policy ever since.

Yes.

73. A GAO report published on December 5, 2013 found that "more than 40 years after Congress passed the Clean Water Act […] EPA reported that many of the nation's waters are still impaired, and the goals of the act are not being met. Without changes to the act's approach to nonpoint source pollution, the act's goals are likely to remain unfulfilled." If confirmed, how will you work to address surface water quality impairments, including from non-point source pollutants?

Congress did not grant EPA authority to regulate non-point sources because regulation of non-point sources is the regulation of land, a traditional state authority. Instead, Congress created a planning process under section 208 of the Clean Water Act and authorized funding for state non-point source management plans under section 319. If confirmed, I will implement the authorities granted to EPA by Congress.

74. You have attacked the Obama Administration's "Waters of the United States" regulation, objecting to "the significant negative impact such a rule would inflict on states and the landowners within their borders." Oklahoma's major streams and rivers lie within two river basins, the Red and the Arkansas, both of which flow into other states. And Oklahoma receives most of its waters from upstream neighbors, particularly Texas. Without national regulation, how would you suggest that that Oklahoma's downstream neighbors - Arkansas and Louisiana - guarantee the quality of the water that flows across their boundaries? And how would you suggest that Oklahoma protects the quality of the water that it receives from upstream neighbors like Texas? You appear to believe that the only parties with an interest in water are those within a state, not downstream neighbors. Why?

Federal jurisdiction exists over navigable water, interstate water, and tributaries that can transport pollutants to navigable waters, and jurisdiction over the interstate rivers that are the subject of your question is not in dispute.

75. Communities across the country are facing the economic and health consequences of contaminated ground water, which impacts water systems and private well owners. How will you work

to ensure communities are protected from drinking contaminated ground water? How will you address and strengthen the EPA's response to groundwater contamination and ensure homeowners and water systems are taking the steps to diagnose, treat, and remediate their groundwater resources?

For drinking water wells that are public water systems, the requirements of the Safe Drinking Water Act apply and EPA has authorities to provide small systems with technical assistance through circuit rider programs. For private well owners, the WIIN Act provided authority for EPA to support a drinking water technology clearinghouse for well owners. If confirmed, I will use the authorities and resources granted by Congress to help both public water systems and well owners.

76. This question is of interest to Senator Manchin and me: We must do everything we can to ensure that every American has access to safe and clean water. West Virginia has had issues with chemicals like PFOA in our drinking water as recently as last year. In fact, the State had to ship in alternative water supplies to the city of Vienna. Martinsburg and Parkersburg also had serious challenges. And, in 2014, the Elk River Chemical Spill left 300,000 West Virginians without access to potable water, so I know Senator Manchin looks forward to working with you to promote federal clean water initiatives. He also appreciates your commitment in your meeting together to working to address these challenges. Please outline how you intend to expand efforts to promote safe drinking water and support the modernization of our nation's water infrastructure.

If confirmed, I will focus on EPA's core missions, including, as appropriate, use of EPA's emergency order authority under the Safe Drinking Water Act.

I also will implement the newly revised TSCA statute to address chemicals and will continue implementation of monitoring, review, and regulation of contaminants under the SDWA if confirmed.

77. One of the tools within the Clean Water Act that communities can use to restore the quality of polluted waters is through the development and implementation of a Total Maximum Daily Load (TMDL) plan. The GAO also found that funding for TMDLs has been insufficient in meeting national needs, with more than 50% of the nation's waters being identified as impaired. Will you advocate for funding to match the needs for the TMDL program? How do you plan to support and strengthen the Total Maximum Daily Load (TMDL) regulatory framework?

If confirmed, I will support continued funding of State programs authorized under section 106 of the Clean Water Act, which states use in part for TMDL development. I also will support flexibility for state use of 106 funds to allow states to focus on priorities such as impaired waters requiring TMDLs. If confirmed, I also will support the continued development of tools to help states develop TMDLs. Finally, I would note that neither GAO nor EPA has said that 50% of the nation's waters are identified as impaired. For example, states have assessed about 32% of rivers and streams. Of those assessed waters, states have identified about 54% as impaired. That means states have data showing that 17% of rivers and streams are impaired. You cannot extrapolate the data from assessed waters to all waters because most states target their monitoring to focus on waters they have reason to believe are impaired, so they can target their resources where they are needed the most.

79. Mr. Pruitt, the Clean Water Act requires EPA to review and revise its national water quality standards for pollutants based on the best available science. EPA has proposed or finalized more stringent standards for ammonia, nutrients, selenium, and dental offices. Do you agree that these standards must be based on the best available science?

Under section 303(c)(1) of the Clean Water Act, states are required to, every three years "hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." Proposed changes to state water quality standards are submitted to EPA. Under 303(c)(3), EPA is to approve the state standards if they meet the requirements of the Clean Water Act. Under section 304, EPA establishes water quality criteria that provide guidance for state water quality standards. The Clean Water Act directs EPA to review these criteria documents "from time to time" except for criteria to protect public health from pathogens in recreational coastal waters, which must be reviewed every 5 years. Unlike the Safe Drinking Water Act, the Clean Water Act does not require the use of best available science. That said, I believe it is always important to use best available science, particularly for science documents like water quality criteria documents.

97. Mr. Pruitt, a growing body of scientific evidence has shown that people living near mountaintop removal coal mines face a number of increased health risks, including greater risk of cancer, birth defects, and premature death. If you are confirmed as EPA Administrator, how would your agency consider these health concerns?

If confirmed, I would consider human health in accordance with EPA's legal authorities.

98. Mr. Pruitt, do you believe that the people who live downstream from surface coal mining operations deserve to have their sources of drinking protected from contamination from toxic chemicals such as arsenic, selenium and lead?

I strongly believe in the importance of safe drinking water, and if confirmed as Administrator, will work to implement EPA's statutory authorities in this regard.

99. Mr. Pruitt, the Manhattan Project and the Cold War triggered a boom in uranium mining in the United States. Uranium mining was carried out under the 1872 Mining Law, which did not require mining companies to clean up the mines. Abandoned uranium and other hardrock mines litter the West. These abandoned mines leach toxic chemicals, including uranium, radium, radon, and arsenic into surface and ground waters that are sources of drinking water.

•Do you agree that there is insufficient funding to address the huge problem of abandoned uranium and other hardrock mines?

•Do you agree that the 1872 Mining Law must be reformed to provide funding for the cleanup of abandoned mines?

I have not studied the issue of whether the 1872 Mining Law should be reformed or whether there is sufficient funding to address the cleanup of abandoned mines. I am generally aware of questions about whether current environmental laws inhibit the cleanup of abandoned mines by Good Samaritans, but I would expect to be briefed by staff before considering any actions on this topic.

141. Provide examples of times the EPA has intervened and required a state to do more than the state intended and you supported the EPA's actions.

The water quality crisis in Flint is one where EPA should have acted faster in accordance with its legal authorities in consultation with the State.

146. Do you agree with the EPA's legal interpretation of the Clean Water Act and share the view the agency has federal jurisdiction over wetlands and streams that impact the health of downstream

navigable waters? If you do not agree, please explain.

The EPA takes a broader view of its jurisdiction under the Clean Water Act than the question suggests. A federal court appeals has held that the EPA's interpretation of its jurisdiction under the Clean Water Act is likely unlawful. I agree with that court's conclusion.

151. The EPA is responsible for administering two of the nation's most important infrastructure investment programs- the Clean Water and Safe Drinking Water State Revolving Loan Funds (SRFs). Unfortunately, water and sewer infrastructure in this country continues to deteriorate and investment is sorely needed. The American Society of Civil Engineers rates our wastewater and drinking water infrastructure a "D." If confirmed, what will you do to ensure that the federal government is adequately investing in our nation's wastewater and drinking water infrastructure?

If confirmed, I will continue support for the Clean Water State Revolving Loan Funds and the new Water Infrastructure Financing Innovation Act loan program. In addition, I would continue to implement EPA's Integrated Planning Framework to provide municipalities with flexibility to prioritize actions they take to come into compliance.

SENATOR GILLIBRAND

18.The Great Lakes Restoration Initiative (GLRI) was launched in 2010 to accelerate efforts to protect and restore the largest system of fresh surface water in the world — the Great Lakes. EPA is a critical member and lead of the GLRI Task Force and Regional Working Group. This coordination in partnership with the states has produced unprecedented results, with GRLI resources funding over 2,000 projects to improve water quality, protecting and restoring native habitat and species, preventing and controlling invasive species, and addressing other Great Lakes environmental problems. Under your leadership, will the GLRI continue to be a top priority?

If confirmed, I will continue EPA's support for the Great Lakes Restoration Initiative, which was formally authorized by Congress in December 2016.

19.Will you support an annual appropriation of at least $300 million for the Great Lakes Restoration Initiative?

I note that $300 million has been the annual appropriation for the Great Lakes Restoration Initiative for the past several years, even though the prior Administration proposed to cut that funding to $250 million. Three hundred million also is the Congressional authorized level of funding. If confirmed, I will take into account that funding history and Congressional authorization when making recommendations to the Office of Management and Budget regarding EPA's appropriations.

22.Should states continue to have the sovereign authority to set their own ballast water discharge standards to protect the environment from the spread of invasive species?

The issue of federal preemption of state ballast water discharge regulations is a question for Congress, not the Administrator of the EPA. If confirmed, I will carry out the authorities granted to EPA by Congress.

29.In 2005, New York State, Connecticut, and the EPA and Army Corps reached an agreement to eliminate or reduce the amount of dredged sediment dumped in the open waters of Long Island Sound. The New York State Department of Environmental Conservation and Department of State have

repeatedly urged the EPA and Army Corps not to move forward with the permanent designation of an open water dumping site in Eastern Long Island Sound, raising concerns that the sediment has not been properly tested and could negatively impact the economic and environmental state of Long Island Sound, which was designated in 1987 by Congress as an Estuary Of National Significance. Will you work to enforce NYS's right to protect Long Island Sound from additional open water dumping of dredged material?

The designation by EPA of an area as a site for dredged material disposal must follow the rigorous process set forth in the Marine Protection, Research, and Sanctuaries Act to ensure protection of the environment. As I stated in my testimony before the Committee, I support following the administrative processes set forth in law, including the National Environmental Policy Act, to ensure that EPA's statutory responsibilities are fully carried out.

30.Will you commit to assisting the states with determining upland alternatives to the open water disposal of dredged material?

Disposal of dredged material is not an EPA mission or responsibility. That lies with the Corps of Engineers.

31.Will you continue the Long Island Sound Study office and ensure it receives the necessary resources from EPA?

As I noted in my testimony before the Committee, I support collaborative efforts to achieve environmental protection. The Long Island Sound Study is a collaborative effort among EPA, New York, and Connecticut. EPA's Long Island Sound Study office was authorized by Congress in 1990 under section 119 of the Clean Water Act. If confirmed, I will carry out all responsibilities given to EPA by Congress.

32.Will you support annual appropriations of at least $10 million for the EPA's Long Island Sound geographic program?

If confirmed, I will seek budgetary resources to carry out all responsibilities given to EPA by Congress. I note that the most recent appropriation for the Long Island Sound program was about $3.9 million and the most recent budget request was about $2.9 million.

41.Perfluorooctanoic acid (PFOA) is listed as an unregulated contaminant under the Safe Drinking Water Act. PFOA was discovered in the municipal water supply and private wells in the Village of Hoosick Falls and Towns of Hoosick and Petersburgh, NY and in North Bennington, Pownal, Vermont. Perfluorooctane sulfonate (PFOS) was found in Newburgh New York.

In 2014, PFOA and PFOS were found in public drinking water wells in Horsham, Warminster, and Warrington, Pennsylvania. They were found by the federal Environmental Protection Agency, as part of the Unregulated Contaminant Monitoring Rule. The amounts of PFOA and PFOS found in the public wells in the area were among the 10 highest samples anywhere in the country based on the provisional health advisory level set by EPA in 2009.

In 2009, EPA set a provisional health advisory level of .4 parts per billion. In May, 2016, EPA set a Lifetime Health Advisory level for PFOA at 70 parts per trillion. How will you work to ensure that drinking water sources are monitored for PFOA and PFOS, particularly in small communities under 10,000 people?

If confirmed, I will carry out the authorities and responsibilities given to EPA by Congress. Congress did not make monitoring eligible for Safe Drinking Water Act State Revolving Loan Fund assistance because it is considered operation and maintenance that is local responsibility. However, Congress recently authorized a grant program to assist small and disadvantaged communities provide safe drinking water. Testing of unregulated contaminants is eligible for assistance under this authority. If funding is provided by Congress, I will carry out that program.

42.How will EPA continue to evaluate the health effects of PFOA on all communities that were exposed, in particular vulnerable populations including infants and fetuses during pregnancy?

As I stated at my confirmation hearing, PFOA is a chemical substance that the Agency should address quickly and I will look to continue evaluating the health effects of PFOA through TSCA and the Safe Drinking Water Act.

43.Will you work collaboratively with other agencies, including the Centers for Disease Control and Prevention, the National Institutes of Health, and the Department of Defense, to ensure that the public is informed about the health effects of contamination?

As I stated at my confirmation hearing I believe collaboration between federal agencies to protect and better inform the public.

44.Will you work collaboratively with states and local governments to ensure that information on PFOA and PFOS are communicated in a transparent and timely manner to the public?

Cooperative federalism and collaboration between EPA and officials at the state and local level is something I feel very strongly about and if I am confirmed I will work collaboratively with state and local governments.

45.In the absence of federal drinking water standards, what role should EPA play in assisting communities whose drinking water supplies have become contaminated by PFCs or other emerging contaminants?

Congress recently authorized a grant program to assist small and disadvantaged communities provide safe drinking water. Testing of unregulated contaminants is eligible for assistance under this authority. If confirmed and if funding is provided by Congress, I will carry out that program.

46.The latest EPA survey of capital improvement needs indicates that public water systems need to invest $384.2 billion on infrastructure improvements over 20 years to ensure the provision of safe tap water. The needs estimate generally excludes costs associated with addressing unregulated contaminants or the costs of replacing lead service lines. What funding level do you view as effective for the EPA Drinking Water State Revolving Fund (DWSRF) capitalization grant program?

The federal government offers some financial assistance but the vast majority of the Investments in public water systems will be made by the public and private entities that own and operate those systems. The Safe Drinking Water Act State Revolving Loan Funds leverage federal investment at about 1.76 to 1. That is, a federal dollar leverages about 1.76 dollars in loan assistance. The new WIFIA program can leverage federal investment at a level of up to 60 to 1. I fully support the Drinking Water SRF and would not support any cuts to that program. However, if Congress provides additional funds I am excited by the opportunities the new WIFIA program presents.

49. As you know, Congress passed a provision in law that exempts hydraulic fracturing from the Safe

Drinking Water Act. Do you think that hydraulic fracturing chemicals should be exempt or do you believe that this law has merit?

Article 1 Section 8 of the Constitution vests in Congress the authority to make our nation's laws and, if confirmed, as a member of the Executive Branch I will faithfully execute my duty to implement and enforce the laws written by Congress.

SENATOR MARKEY

1. There is tremendous diversity across states in this country, and occasionally states have differences of opinion on how to approach a problem. One of the roles of the federal government is to be an arbiter among states.

• What is your philosophy on how interstate pollution conflicts should be handled?

• Should a state be able to pollute a river for which another state relies on for drinking water?

• What is the EPA's role in resolving interstate pollution conflicts?

• How would you determine when EPA should be involved in interstate pollution disputes?

As I testified in the hearing, I have pursued opportunities to address interstate environmental quality matters. One of the examples I have highlighted is the work that Arkansas Attorney General Dustin McDaniel and I took to address an enforceable water quality standard between Arkansas and Oklahoma. I have also discussed how Texas should be responsible when air quality issues affect Oklahoma and my experience with that. When negotiations among and between states breakdown EPA has a role to set environmental standards. However, that is should be a last course of action instead of the first. I believe environmental statutes are designed with states as a primary implementer. Environmental statutes envision that states have the delegated enforcement and primacy to implement and enforce environmental statutes. Only when that is not happening or when negotiations between and among states breakdown should EPA determine a dispute and only after attempting to assist states negotiate a local solution. I am fond of saying that we need national standards and neighborhood solutions. I think that should shape the work of the EPA.

22. Our oceans are essential for life, and much of what happens on land ultimately ends up in our oceans. There are many ways in which our actions on land can both positively and negatively affect marine life and the marine environment. Under the Marine Protection, Research and Sanctuaries Act (MPRSA), the EPA ensures that harmful substances are not dumped into the marine environment. Additionally, reducing ocean pollution is a global goal in which the U.S. is an active participant.

• In your opinion, what role does the EPA have in protecting our oceans and the marine life within?

• How specifically will the EPA, under your administration, ensure that harmful manmade substances do not end up in our oceans?

• How will the EPA continue to ensure the U.S. is a leader in reducing ocean pollution, and assisting other countries in reducing pollution that makes it into our oceans?

If confirmed, I will carry out the authorities and responsibilities given to EPA by Congress. These include responsibilities under the Marine Protection, Research and Sanctuaries Act.

30.Hydraulic fracturing (fracking) now provides more than half of the United States oil output. In 2000, fracking provided less than 2% of America oil. This has dramatically changed the energy landscape of the United States.

•Do you believe that hydraulic fracturing (or fracking) is the cause of the increased frequency and strength of earthquakes in Oklahoma? Please explain.

•As Attorney General have you taken any actions related to earthquakes caused by fracking?

•In May 2016, you testified that the decline in the coal industry was due to the price drop of natural gas and not EPA regulation. Do you stand by this statement? If not, why have your views changed?

•Do you believe that fracking can contaminate drinking water supplies? Please explain.

Scientists from the state level up to the National Research Council have found that the act of hydraulic fracturing itself poses very little risk of creating seismic events. Seismicity concerns related to the oil and natural gas industries are more commonly tied to the underground injection of wastewater which is regulated by the Safe Drinking Water Act. As I stated in my testimony, in Oklahoma the Corporation Commission has jurisdiction over this matter and I have been in contact with that agency that has taken very meaningful steps to address seismic concerns. I believe that there is not one single factor that has precipitated the decline in the coal industry alone. Finally, I agree with EPA's Dr. Thomas Burke who, following the release of EPA's final hydraulic fracturing water study, reiterated that the Agency only found a small number of confirmed cases of contamination. With well over one million wells that have been hydraulically fractured in the United States the evidence found by EPA suggests a very low likelihood of drinking water contamination from hydraulic fracturing or its associated activates.

31.This past December, the EPA released a report entitled, "Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States." The EPA found scientific evidence that fracking activities can affect drinking water supplies.

•Have you read this report?

•What steps will you take as Administrator to reduce the possibility of drinking water contamination due to hydraulic fracturing activities?

•Of those chemicals used in hydraulic fracturing activities, the EPA found that nearly 200 might pose a public health risk. Will you commit to continuing to study these identified chemicals and the potential health risks, as well as identify other potential harmful chemicals used in hydraulic fracturing activities?

I am familiar with the report and if confirmed as EPA Administrator I will faithfully execute my legal duties to administer laws as authorized by Congress including the Safe Drinking Water Act. Understanding and studying risks to local communities is something central to the role as Administrator and I will continue to study potential risk using the Agencies many tools.

47.Lead is not just a problem in Flint, Michigan, but all over the United States including Oklahoma. In your capacity as Attorney General of Oklahoma, what did you and your office do to prevent childhood lead exposure?

While I am concerned about children's health, matters of the sort you reference would be handled by Oklahoma's environmental regulators at the Department of Environmental Quality and the

Oklahoma Water Resources Board.

48.During your confirmation hearing before the Environment and Public Works Committee, in response to a question, you indicated that you did not know if there is a safe level of lead. Scientific experts at the Centers for Disease Control and Prevention (CDC) and the World Health Organization, among other leading scientific bodies have repeatedly warned of the dangers of lead, specifically to children, concluding that there is no level of lead exposure that is safe.

•Do you agree that exposure to lead is dangerous and that no level of exposure should be considered safe?

•If confirmed, will you commit to making reducing childhood lead exposure a priority?

•What specific strategies will you implement to reduce lead exposure?

•Will you advocate for more funding for the programs that reduce lead exposure risk, especially in children?

I have not myself reviewed the scientific studies correlating blood lead levels to impacts in children. However, it is my understanding that neither EPA nor CDC have identified a "safe" level of exposure, but instead have adopted levels appropriate for action under their specific statutory authorities. If confirmed I will carry out EPA's authorities to reduce exposure to lead, including exposures by children.

49.The EPA is tasked with implemented the Safe Drinking Water Act (SDWA), and ensuring that the drinking water supply for many Americans is safe. Given the Flint, Michigan drinking water crisis, many Americans that took clean water for granted are now being faced with questions about a basic necessity.

•The Water Infrastructure Improvement for the Nation (WIIN) Act of 2016, or WIIN Act, passed Congress was signed by the President, and became public law on December 12, 2016. Will you commit to, as expedient as practicable, implementing the changes to the Safe Drinking Water Act?

•The human-caused drinking water crisis in Flint, Michigan has highlighted the widespread concern of lead in drinking water pipes across the nation. Additionally, nearly 4 million Americans may be unknowingly drinking unsafe water. Are you aware of how many public water systems in the United States have issues with lead in drinking water above safe levels?

•If a public official knowingly exposes their community to dangerous levels of contaminants, such as lead, should that official be held accountable for such actions? What do you think are acceptable punishments for such an action?

•If confirmed as EPA Administrator, what will you do to ensure that communicates across America have safe drinking water that is not contaminated with lead?

If confirmed I will fully implement the changes to the Safe Drinking Water regulatory requirements made by the WIIN Act, including the changes to the notification requirements relating to lead levels in drinking water. If funding is provided, I will also implement the assistance programs authorized in that Act. I also will fully implement the existing authorities under the SDWA, including, as appropriate, EPA's authority to take emergency action. If confirmed I will seek a briefing from EPA staff on the number of public water systems that are not in compliance with the SDWA Lead and

Copper Rule. I am unaware of EPA authorities to punish individuals other than to seek the resignation of responsible EPA officials, such as the resignation of the former Regional Administrator of EPA Region 5 who resigned after her failure to act upon information regarding the lead levels in the Flint water system became public.

SENATOR MERKLEY

1. In an interview with The Oklahoman in 2015, you were talking about Oklahoma's environmental lawsuit against poultry producers who were polluting the Illinois River basin, and you said that in your view, regulation through litigation is the wrong approach. However, you have been highly active in bringing lawsuits against the EPA, whose regulations typically incorporate information gathered as a result of the kind of extensive stakeholder outreach that you seem to value. What have your experiences in suing the EPA taught you about how to lead the agency?

My experiences suing the EPA have taught me the value of ensuring that the EPA acts lawfully so that the regulations it promulgates are actually put to work protecting the environment, rather than being invalidated by courts.

10. Pacific coast shellfish aquaculture is estimated to be a $278 million industry, but over the last decade, oyster growers have struggled to maintain yields because the water in the hatcheries is becoming too acidic for oysters to survive. The oceans are becoming more acidic because they are absorbing more and more CO2 from the atmosphere. The impact of this acidification on oyster farming has been documented in the scientific literature. On numerous occasions, you've expressed skepticism about climate change, but there is no doubt in the minds of these shellfish growers about the reality that increased CO2 levels are threatening their livelihoods. As EPA Administrator, how would you address this issue?

If confirmed, I will implement the laws that EPA is charged to administer. Under section 304 of the CWA EPA establishes water quality criteria to protect aquatic life, including shellfish. Certain EPA programs also include authorities that can support projects that may benefit the shellfish industry, including the National Estuary Program under section 320 of the CWA, the Long Island Sound programs under section 119 of the CWA, and the Chesapeake Bay program under section 117 of the CWA. Finally, section 319 of the CWA can support programs and projects to reduce runoff that may impact oyster beds..

18. Last year, Oklahoma's Department of Environmental Quality added eight lakes to what is now a list of 40 lakes where people should limit their fish consumption due to the dangerous levels of mercury. Do you believe that coal fired power plants contributed to the mercury contamination in those 8 lakes? Do you believe coal fired power plants contribute to mercury contamination in the environment?

I agree with the Oklahoma Department of Environmental Quality's determinations regarding fish advisories. As discussed elsewhere in my written responses to the Committee, coal fired power plants are the largest point source emitters of mercury into the air in the United States. I do not have direct knowledge of whether these fish advisories were caused by coal fired power plants or other sources, and if so whether those sources are located in the United States or elsewhere.

19. Do you agree that fish consumption is a leading source of mercury exposure and that the source of mercury in fish comes largely from the burning of fossil fuels? If you disagree, please explain why, including citations of the authoritative bodies that support your position.

I agree that fish consumption is a leading source of mercury exposure, particularly in certain subpopulations, such as unborn children.

26. If the Sixth Circuit and the Supreme Court approve EPA's "Waters of the United States" rule defining the jurisdictional extent of the Clean Water Act, would you direct the EPA to amend that rule? If so, how? If the courts invalidate EPA's "Waters of the United States" rule, how would you direct the EPA to define which waterways and wetlands are protected by the Clean Water Act?

If I am confirmed, I will seek to make changes to the WOTUS rule following all appropriate administrative procedures, including the requirements of notice and comment under the Administrative Procedure Act.

27. In your opinion, under what circumstances should the Clean Water Act apply to pollution being discharged into groundwater? If the Ninth Circuit's forthcoming decision in Hawai'i Wildlife Fund v. County of Maui conflicts with your view, would you direct the EPA to write a new regulation overruling the 9th Circuit?

I believe that the Clean Water Act applies only to discharges to surface water, not groundwater. In contrast, the Safe Drinking Water Act requires permits for underground injection into certain aquifers. I cannot speculate on a judicial decision that has not been issued.

33. President-Elect Trump has stated that the drinking water crisis in Flint, Michigan, would never have happened if he was president. If appointed, what measures do you plan to take to protect drinking water across the country and particularly for the most vulnerable populations?

If confirmed, I will return EPA's focus to carrying out its core missions, including, as appropriate, use of EPA's emergency order authority under the Safe Drinking Water Act.

34. Oklahoma has seen a massive increase in earthquakes recently (907 (>magnitude 3.0) in 2016 and 585 in 2015 - which is more than the previous 35 years combined). The Oklahoma Geological Survey released a report in 2015 linking the disposal of fracking wastewater with earthquakes in Oklahoma. As recently as November 2016, a 5.0 magnitude earthquake struck Cushing, Oklahoma. Forty to fifty buildings were reported to have been damaged; Governor Mary Fallin felt the damage was substantial enough to declare a state of emergency for Payne County, where Cushing is located (a first step towards being granted federal aid). • What was the incidence of earthquakes in Oklahoma prior to widespread use of hydraulic fracturing in the past decade? • What has been the incidence of earthquakes in Oklahoma in the past 10 years, since widespread use of hydraulic fracturing? • What have been the economic and health impacts of earthquakes in Oklahoma in the past 10 years? • What was your rationale for not using the office of the Attorney General to change the disposal practices of wastewater from hydraulic fracturing to protect the citizens of Oklahoma?

As I discussed at my confirmation hearing, the State of Oklahoma has taken seismicity issues very seriously and has taken proactive and aggressive actions. Oklahoma, as have other states, been successfully regulating hydraulic fracturing since the 40's and 50's. State and federal geologists have largely confirmed that the while the act of hydraulic fracturing itself poses little seismicity risk, the underground injection of wastewater at certain pressures and volumes can result in some seismic activity. While earthquakes have increased in frequency in recent years, the State has taken aggressive actions and reports have indicated the rate of seismic events has recently declined. Seismic activity can of course have significant impacts on communities and the activities linked to

seismicity concerns in Oklahoma are regulated under state law by other agencies that my office works with as appropriate under Oklahoma law.

35. The EPA is the front line agency serving or assisting Indian Country with environmental protection and recognition of treaty rights. As EPA Administrator, would the you commit to the protection of tribal treaty rights in agency decision making processes in situations where rights may be affected by EPA actions including federal approval of: • state water quality standards (CWA) • state 401 water quality certifications • state distribution and use of pesticides (FIFRA) • oil spill program countermeasures (SPCC)?

If confirmed, I will commit to ensuring that the United States meets all treaty obligations that it has pursuant to treaties with Indian Tribes.

36. Will you support current efforts to establish federal baseline water quality standards for Indian Reservations that do not currently have Clean Water Act standards in place? Please explain why or why not. An advanced notice of proposed rulemaking on this initiative was published in the Federal Register on September 29, 2016.

Because an advance notice of proposed rulemaking has been published, this matter will come before me for decision if I am confirmed as Administrator. Thus, I will not prejudge the outcome, but rather will commit to fairly evaluating the matter and reaching a sound decision.

54. As part of the Water Infrastructure Improvements for the Nation (WIIN) Act of 2016, Congress passed the Columbia River Restoration Act, a program which gives the EPA authority to create a competitive grant program to address environmental cleanup and restoration in the Columbia River Basin. This program empowers states and local communities to better coordinate and implement local cleanup and restoration efforts. Will you, as EPA administrator, work to advance and implement this bipartisan effort to empower local entities and states?

While I am not familiar with the Columbia River Basin restoration program, I support collaborative efforts and neighborhood solutions. I also respect Congressional authorizations. If confirmed, I will ask the EPA staff to brief me on this program and the new authority granted by Congress.

55. In January, 2017, the EPA announced $17 million in credit assistance for the Water Infrastructure Finance and Innovation Act (WIFIA). This program, initially passed into law as part of the 2014 WRDA bill, now has the funding needed to allow EPA to make approximately $1 billion in loans and leverage a total $2 billion in total water-infrastructure investment. As you mentioned in your hearing, water infrastructure is critically needed, but often overlooked. Will you, as EPA administrator, work to ensure adequate resources to implement the WIFIA loan program, and seek further funding and assistance for other water infrastructure programs and initiatives, such as the Drinking Water State Revolving Fund?

Yes, if confirmed.

SENATOR SANDERS

11.Constituents have expressed concerns regarding the potential impact on the environment, quality of life, health and traffic congestion as a result of the Keystone Sanitary Landfill. How do you intend to work collaboratively with states in the event that a state violates the federal Clean Water Act or the Safe Drinking Water Act or a state requests assistance from EPA?

I believe states play an important role in administering environmental laws such as the Clean Water Act, and if confirmed, I would expect to work cooperatively with states toward our shared goal of protecting human health and the environment consistent with EPA's legal authorities.

President-elect Trump has stated that the water poisoning that happened in Flint Michigan "would never have happened if I were president." More than 1,000 communities have lead poisoning levels higher than those found in Flint Michigan.

24.If you were head of EPA what actions would you take to ensure that every community has clean water to drink?

If confirmed, I will focus on EPA's core missions, including, as appropriate, use of EPA's emergency order authority under the Safe Drinking Water Act. I also will implement the newly revised TSCA statute to address chemicals and will continue implementation of monitoring, review, and regulation of contaminants under the SDWA.

25. What federal financial commitments would you need and what changes in environmental laws, policies and regulations would you need to ensure that a Flint-like situation never happens again?

It is my understanding that some requirements in the Safe Drinking Water Act Lead and Copper Rule relating to monitoring and when corrosion control treatment is mandated are ambiguous and need to be clarified to make both compliance and enforcement easier and prevent a Flint-like situation from happening again. If confirmed, I will ensure that the revisions to that rule proceed expeditiously. As to resources, I will return EPA's focus, including resources, to carrying out its core missions. In addition, I believe that the new WIFIA program offers significant opportunities to leverage additional infrastructure investments.

Lake Champlain is one of Vermont's most treasured environmental features. Tourism and property values are tied to the health of the lake—keeping its waters swimmable, fishable and drinkable. Run-off—including from lawns, paved roads and parking lots, and farmlands—contributes to high levels of phosphorus that spur algae growth. The algae turns the lake green and can be toxic. In 2016, EPA released new phosphorus limits for the lake by establishing a TMDL (Total Maximum Daily Load). We are concerned that you, as Attorney General, have opposed other clean-ups similar to that of Lake Champlain. You signed an amicus brief opposing EPA's clean-up of the Chesapeake Bay under the Clean Water Act.

26.As Administrator, will you continue the agency's support for the clean-up of Lake Champlain through these new TMDLs?

A TMDL under section 303(d) of the Clean Water Act does not establish a water quality standard. It is a tool for achieving a water quality standard by determining how much of a particular pollutant, like phosphorus, that a body of water can assimilate and achieve the water quality standard. EPA recently issued new phosphorus TMDLs for Lake Champlain to implement Vermont's water quality standards. These replace a prior TMDL that EPA had approved in 2002 and then disapproved 9 years later after being sued by the Conservation Law Foundation. I am not familiar with the details of either the original Vermont TMDL that EPA approved or the new TMDLs that EPA developed after being sued. I believe TMDLs can only be successful if developed in a collaborative fashion. It is my hope that the new Lake Champlain TMDLs were developed in such a fashion and in accordance with the law. If so, I am not aware of any reason that I would not support their implementation, if

confirmed as EPA's administrator.

27.Specifically, should Vermont fail to make satisfactory progress toward meeting the TMDL, would you support EPA's prior pledge to ramp up federal oversight of Vermont programs and crack down on pollution from wastewater treatment facilities? If not, how will you ensure Clean Water Act obligations are satisfied?

Under Clean Water Act regulations (40 CFR 122.44), limits in a NPDES permit for a point source must be consistent with any waste load allocation for the discharge set forth in a TMDL and once these limits are part of a permit, they are federally enforceable. Vermont is authorized to carry out its own permitting program in lieu of the federal permitting program. If confirmed, I will work with the State of Vermont to see that the requirements of the Clean Water Act are met.

The EPA works with other state and federal agencies in developing contingency plans in the event of an oil spill. These plans identify and coordinate the activities of the different government agencies and private organizations involved in the response. Vermonters are concerned about the potential for oil spills, particularly from rail accidents, that might adversely affect the state's waters. We view the EPA as a critical partner in developing plans for, and responding to, the case of an oil spill with potential impacts to a water body or other area subject to the jurisdiction of the Environmental Protection Agency under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

28.Do you as Administrator commit to the EPA's partnership with the states in developing plans for, and responding to, the case of an oil spill that affects waters under its jurisdiction, such as Lake Champlain?

EPA, in partnership with other federal agencies on the National Response Team, has a significant role in carrying out the National Oil and Hazardous Substances Pollution Contingency Plan. EPA is the lead agency for responses under the Oil Pollution Act to spills into inland waters (other than the Great Lakes) and the Coast Guard is the lead agency for coastal waters and the Great Lakes). If confirmed, I will support EPA's continued implementation of the oil spill response authorities given to it by Congress.

Oil and natural gas extraction by way of hydraulic fracturing, or "fracking," has expanded rapidly in the United States, including in your state of Oklahoma. As you know, there are increasing concerns about water and air contamination, including the seismic activity associated with wastewater disposal. EPA conducted a study of hydraulic fracturing's drinking water impacts and released a final report in December 2016. The agency found "hydraulic fracturing activities can impact drinking water resources under some circumstances." The report identifies certain conditions under which impacts from hydraulic fracturing activities can be more frequent or severe. Both Vermont and New York have effects.

33.Do you concur with the conclusions of the EPA's final report on hydraulic fracturing and drinking water?

As I discussed at my confirmation hearing, states like my home state of Oklahoma have been successfully regulating hydraulic fracturing for decades. As EPA officials have indicated the number of identified cases of drinking water contamination related to hydraulic fracturing activities is small particularly compared to the large number of hydraulically fractured wells and I agree with that assessment.

34.Are there gaps in available data that make it difficult for the EPA to fully assess hydraulic fracturing effects on drinking water as well as air quality?

Hydraulic fracturing has been extensively studied by state, federal, and non-governmental bodies.

35.What further studies—if any—do you believe would be appropriate for EPA to conduct on the effects of hydraulic fracturing on air and water quality?

I am not aware of any urgent need for new studies of hydraulic fracturing but if confirmed I commit to review any new information on the subject.

36.Do you agree, as EPA scientists found, that of the 1,606 chemicals injected for hydraulic fracturing, 173 chemicals are a proven risk to public health?

Risk encompasses both hazard as well as a likelihood of exposure. EPA found that 173 of the chemicals listed can be hazardous but did not speak to their risk likely because of their very low probability of exposure.

To date communities have been absorbing the costs of damage from oil and gas operations, whether that is in terms of health impacts, contaminated soils and water, which depress property values and destroy businesses, residential neighborhoods turned into industrial zones, earthquakes caused by injection wells (which are increasingly being excluded from homeowner insurance policies) and more.

37.What would be your approach as Attorney General to ensuring that communities do not to absorb these costs, and operators become responsible for the full costs of their operations, including damages?

As discussed at my confirmation hearing as Attorney General I have taken on oil and natural gas companies who violated Oklahoma laws and regulations. If confirmed, I will uphold and execute the laws as established by Congress.

38.Given that High Volume Hydraulic Fracturing (HVHF), or fracking gas wells, currently require an average of 4.8-9.7 million gallons of fresh water to fracture a single well (Note: This demand is growing by 11-20% per year), and only 4.5-7.5% of this water is being recycled, would you consider modern-day oil and gas drilling to be a long-term, sustainable solution to our country's energy needs?"

EPA's final report on hydraulic fracturing and drinking water found that in most cases hydraulic fracturing constituted "generally less than 1% of total water use" in counties and stated that their findings suggested "that hydraulic fracturing operations represented a relatively small user of water in most counties." I agree with these specific EPA conclusions.

39.When did you first find out that fracking could cause earthquakes in Oklahoma under certain geological conditions? Did you publicly call on industry to alter their practices?

As I stated at my confirmation hearing the Oklahoma Corporation Commission is vested with the jurisdiction of regulating oil and gas activities, they have acted to address seismicity concerns in the state and I have worked with and supported the Commission and other state agencies as required by state law.

40.What percentage of injection wells in Oklahoma is monitored for pollution (in groundwater, deep and shallow)? In those that were monitored, what was the concentration of pollutants?

Wastewater disposal through underground injection is regulated by the State of Oklahoma through delegated powers from the EPA pursuant to the Safe Drinking Water Act and to the best of my knowledge the State appropriately follows all requirements under the law.

The “Hockey Stick Moment” is when a variable of interest hits an exponential point in its growth with respect to time. The most notable “Hockey Stick Moment” is the rising levels of atmospheric CO2, N2O, and CH4 resulting from anthropogenic forces. However, a moment closer to Oklahoma is the exponential increase in earthquake activity even the USGS has shown is a function of the disposal of nearly 20% of US fracking waste into Oklahoma and Kansas' Class II Injection wells.

41.Do you agree that this growth in quake activity is a function of excessive and irresponsible oil and gas waste generation and disposal and is worthy of more research and monitoring by the EPA?

As previously mentioned, wastewater disposal through underground injection is regulated by the State of Oklahoma under delegated powers from EPA pursuant to the Safe Drinking Water Act. Underground injection is not unique to the oil and natural gas industries as EPA has regulations on six different classes of underground injections. Underground injection of wastewater from oil and natural gas activities has been conducted safely in a number of states for decades, and, in a previous EPW hearing, Senator Cardin complimented "the actions taken" in Oklahoma with regard to oil and gas wastewater disposal. He went so far as to say the State "provided a good model that should be used in other States," lauding Oklahoma's actions as an example of "the Federal Government working with the State to develop the right framework for dealing with natural gas extraction." The State of Oklahoma has acted on local seismicity concerns and, to the best of my knowledge, follows all applicable SDWA requirements in regulating class 2 injection wells within the state.

42.You at first belittled the idea that oil and gas operations could cause human induced seismicity in Oklahoma, so did Harold Hamm. Do you now believe that you were both wrong?

As new information becomes available on a number of issues it should always be evaluated and taken into consideration. The State of Oklahoma has taken actions to address seismicity concerns related to the oil and natural gas industry and I support the state taking action.

Changes in weather patterns, such as heavier precipitation events that increase run-off and flooding, are affecting lakes, rivers, and reservoirs nationwide. Water quality, quantity, and the integrity of our water infrastructure are at risk. Recent studies in the Northeast have found that degraded water quality on lakes can cost lakeside communities millions of dollars in losses from both tourism and taxable income due to reduced property values.

47.How will the EPA support water resource management programs to address these issues?

If confirmed, I will continue to implement the water quality protection authorities granted to EPA by Congress. These include regulatory and financial and technical assistance programs. The Clean Water Act expressly leaves the allocation of water quantity to states. I further note that Congress has not given EPA water resources management authorities. Instead, such programs are carried out by the Corps of Engineers and, in the 17 Western states, the Bureau of Reclamation.

48.How would you address EPA’s permitting backlog, e.g. the National Pollutant Discharge Elimination System (point source water dischargers) program?

Making sure permits are current is one of core functions under the statutory responsibilities given to

EPA and in turn carried out by authorized states. However, in recent years states have been asked to shift their focus and resources to other activities. If confirmed, I would focus on ensuring EPA is able to carry out its core functions under our environmental.

In a court filing opposing the Waters of the United States you wrote "This regulation usurps the state's authority over its land and water use, and triggers numerous and costly obligations under the [Clean Water] Act for the state and its citizens."

51.Without national regulations how would you guarantee the quality of water that flows across state boundaries?

Regulation of rivers and streams that form the boundaries of states or flows from one state to another is not an issue raised by states in the WOTUS litigation.

52.Do you believe that the only people with an interest in water are those within a state and not downstream neighbors?

No.

“Green infrastructure” (forests, wetlands, natural floodplains, etc.) can play a critical role in reducing impacts of flooding from extreme weather events like Tropical Storm Irene, and in helping to meet essential water quality requirements/improvements such as the EPA-approved Lake Champlain Total Maximum Daily Load (TMDL) plan. Also, green infrastructure is often much more cost effective than updating or investing in new traditional “gray infrastructure.” EPA has played an important role in providing training, technical and financial assistance related to capitalizing green infrastructure.

95.What do you see as EPA’s role going forward related to green infrastructure?

Green infrastructure is a good example of a neighborhood solution that can achieve compliance with national standards. I believe EPA should be supportive of such efforts. If confirmed, I will work to break down barriers within EPA to the use of green infrastructure.

In your own state of Oklahoma, wastewater disposal from fracking and drilling has induced thousands of earthquakes, threatening lives and destroying property. Joe and Mary Reneau suffered through a 5.7 magnitude quake (Nov. 6, 2011) near Prague, Oklahoma – their chimney fell into the living room, right on top of a favorite spot of Mary’s to sit. Luckily for them, Mary wasn’t sitting there at the time, they had earthquake insurance, and they had $200,000 of repairs done on their house. Joe jokes that he won the earthquake lottery. Jerry and John Loveland weren’t so lucky, they had $50,000 worth of damage done on their house, no insurance, and no way to pay for the damage. Oklahoma is an oil and gas state. Joe Reneau said he wouldn’t bring any claims against the oil company, because if he did, he would be “run out of town.” Oklahoma regulators have done next to nothing to help those harmed by oil industry induced quakes or prevent more destruction.

96.As EPA administrator, what will you do to help the Amos family, John and Catherine Fenton, or all those in Oklahoma threatened by oil industry induced earthquakes?

As I have previously stated, underground injection is regulated by the State of Oklahoma under delegated authority from EPA under the Safe Drinking Water Act. The State has taken action to address seismicity concerns and, if I am confirmed, I will continue working with States and within EPA's legal authorities to address public health and environmental concerns.

In September 2016, the EPA recommended a moratorium on the underground injection of fracking wastewater in certain earthquake-prone parts of Oklahoma because regulations had not successfully addressed the problem.

97.Will you uphold the EPA's recommendation—yes or no?

The State of Oklahoma has worked collaboratively with the EPA to address seismicity concerns and state regulators have shut down dozens of underground injection wells and, if confirmed, I will continue this cooperative approach to addressing such future issues as they might arise.

98. Specifically, EPA's recommendation arose out of the agency learning that the Oklahoma Corporation Commission, the body overseeing the underground injection control program in a primacy agreement with the EPA, has illegally permitted restricted wells to return to normal operations. While EPA cannot order Oklahoma to impose a moratorium, it can revoke the state's authority and take over regulation of the wells itself. As EPA Administrator, will you regulate these wells in compliance with the Safe Drinking Water Act and in addressing the seismic catastrophe occurring in your state—yes or no?

If confirmed as EPA Administrator I will review relevant information, including EPA's legal authorities, to ensure drinking water protections in Oklahoma and across the nation.

The FracTracker Alliance has shown that 11% of organic farms are within 1/2 mile of oil and gas development, and 100% of farms within the San Joaquin Valley and Southern California are within 8 miles of oil and gas operations (59,840 wells), and that produced water is being used to irrigate crops (and also organic crops). California feeds 50% of the country.

102. What is your response to the US maintaining food independence and food safety when the majority of its food sheds are threatened by oil and gas contamination?

I have seen no evidence or information that proximity to oil and natural gas development has contaminated or threatened to contaminate our nation's food safety. The State of California would be better able to address their laws and regulations with regards to the location of oil and gas development in their State as well as their irrigation policies.

SENATOR SULLIVAN

1. Alaska's seafood industry is the nation's largest and is one of major employer's in the Alaska economy. In fact, over 60 percent of the nation's commercially harvested fishery resources are caught and processed in Alaska. Alaska's waters remain some of the cleanest and most pristine in the nation. Most of the seafood processors who process these great resources are located in remote areas of Alaska. Each of those processors hold Clean Water Act discharge permits for the small amounts of seafood waste produced during procession operations.

EPA has delegated the management of those discharge permits to the State of Alaska Department of Environmental Conservation as directed by the CWA. In spite of that delegation, EPA remains actively involved in deciding issues that impact the ability of the state agency to accomplish its mission. For example, the EPA is currently considering a rule change that would dramatically impact the operation of seafood processing plants in those remote areas. That change could result in some of those operations having to cease processing because they cannot comply with this rule change. The current rule has been in place for almost 35 years and there is no water quality problem in the locations to justify such a rule change.

Will you commit to reviewing this proposal and confer with the Alaska Congressional Delegation prior to making any change to the current status?

If confirmed, I will review this proposal and confer with the Alaska Congressional Delegation prior to changing the Clean Water Act regulations currently applicable to seafood processors.

The Alaska Department of Environmental Conservation has recently issued a draft Clean Water Act APDES permit to allow seafood processors to continue discharging small amounts of waste pursuant to the Clean Water Act. Unfortunately, EPA is objecting to some of the permit conditions. Again, they are doing so with no known water quality issues or public concern about those conditions. Rather, it appears as though the EPA does not approve of the manner in which our state agency is pursuing its obligations. As a former State of Alaska Department of Natural Resources Commissioner, I have great faith in the ability of state employees to make solid permitting decisions that will protect the state's environment while allowing operations and employment to continue that are compliant with the Clean Water Act.

2. Will you commit to reviewing these EPA actions and allow the state to issue its permit?

Yes, if confirmed, I will review EPA's actions as they relate to Alaska seafood processing permits. As I stated in my testimony, I support national standards and neighborhood solutions.

4. Section 404(c) of the Clean Water Act:

Do you believe that EPA's use of a preemptive veto of a project under section 404(c) of the Clean Water Act may create the opportunity for overreach by the agency and could undermine administrative process and the rule of law?

As I stated in my testimony, I believe that it is very important that federal agencies follow the appropriate legal process when taking any actions. Any preemptive action before the completion of a statutorily mandated process could undermine both the administrative process and the rule of law.

SENATOR WHITEHOUSE

1.Estuaries are important coastal habitats the sustain unique wildlife and plant species, serve as a nurseries for commercially important fish, buffer coastal communities from coastal storms, and filter water as it flows into the ocean. The EPA manages a network of 28 estuaries of national significance around the country. Last Congress, the National Estuary Program (NEP) was reauthorized through 2021 (Public Law No.114-162) in a bipartisan effort and charged with providing grants to support projects that address a number of problems facing estuarine and coastal environments, including seagrass habitat loss, harmful algal blooms, invasive species, and sea level rise. Coming from a non-coastal state, please describe in detail how you will acquaint yourself with 1) the NEP, and 2) coastal issues the NEP helps address.

If confirmed, I would expect to be briefed by EPA staff on the relevant statutory authority and any EPA programs established pursuant to this authority.

2. Each NEP must institute a Comprehensive Conservation and Management Plan (CCMP) to guide management and conservation decisions at the NEP. The effects of climate change on estuaries (i.e., saltwater inundation, increased rainfall-driven runoff, warming waters) are included in these CCMPs. Would you direct the NEPs to disregard the consequences of climate change in the CCMPs and other

decision-making reports and tools?

If confirmed, I would expect to be briefed by EPA staff on the relevant statutory authority and any EPA programs established pursuant to this authority. If confirmed, I will follow all as enacted by Congress.

3. The Climate Ready Estuaries program coordinates with the NEP to educate managers on how to assess the effects of climate change on U.S. estuaries. It also provides recommendations and toolkits to help design climate change adaptation and risk identification capabilities. Will you direct the Climate Ready Estuaries program to remove any materials, cancel any webinars or presentations, or stop its coordinated work on climate change with the NEPs?

I am not familiar with the details of the specific program referenced in your question. If confirmed, I would expect to be briefed by EPA staff on the relevant statutory authority and any EPA programs established pursuant to this authority.

4.Marine debris is a growing problem around the world, with plastic debris being the most troublesome component due to its pervasiveness and persistence in the marine environment. The EPA is currently a co-chair of the federal Interagency Marine Debris Coordinating Committee. Under your direction, will the EPA to maintain a leadership role on the committee? How will you continue EPA's coordinated work with NOAA and other agencies to prevent marine debris, conduct education outreach, and support research efforts?

I am not familiar with the details of the specific program referenced in your question. If confirmed, I would expect to be briefed by EPA staff on the relevant statutory authority to better understand EPA's role compared to those of other federal agencies on this issue.

5.EPA completed a State of the Science White Paper in December entitled "A Summary of Literature on the Chemical Toxicity of Plastics Pollution to Aquatic Life and Aquatic-Dependent Wildlife." The white paper identified four key areas where additional research is needed: 1) "the fate of chemicals both sorbed to and in plastics under differing environment conditions and within an organism after ingestion;" 2) "the relative role plastics play in chemical contaminant transfer to the tissues of organisms compared to other exposure pathways (aqueous dermal exposure and ingestion from natural prey);" 3) "the relative impacts of physical and chemical effects of ingested plastic particles on a wide range of organisms;" and 4) "whether the relatively high surface area of nanoplastics compared to microplastics and their potential to permeate membranes with increased retention time may increase their toxicological risk to organisms." What is EPA's role and responsibility in finding answers to these research questions?

I am not familiar with the report referenced in this question. If confirmed as Administrator, I would expect to be brief by staff to learn more about EPA's authorities and responsibilities before taking any actions referenced in the question.

6.Do you accept the science of ocean acidification that has directly connected the increase in human-caused carbon dioxide emissions with decreases in ocean pH?

First, I would note that the oceans are alkaline and are projected to remain so. Second, it is my understanding that the degree of alkalinity in the ocean is highly variable and therefore it is difficult to attribute that variability to any single cause.

7.Do you accept that the oceans are currently acidifying at a rate unprecedented in tens of millions of years?

First, I would note that the oceans are alkaline and are projected to remain so. Second, it is my understanding that the degree of alkalinity in the ocean is highly variable and therefore it is difficult to attribute that variability to any single cause. I am unaware of tens of millions of years of data on the pH of oceans.

8.Do you accept ocean acidification's predicted toll on coral reefs worldwide, important habitats for recreation, tourism, and commercial fishing?

I am aware that there is a relationship between the alkalinity of water and the calcification process that grows shells and reefs and that a decrease in alkalinity can impair that process.

9.What is the EPA's role in helping states and coastal communities mitigate or adapt to the challenges projected for the shellfish industries or the thousands of individuals that make their living off of this billion-dollar resource?

If confirmed, I will implement the laws that EPA is charged to administer. Under section 304 of the CWA EPA establishes water quality criteria to protect aquatic life, including shellfish. Certain EPA programs also include authorities that can support projects that may benefit the shellfish industry, including the National Estuary Program under section 320 of the CWA, the Long Island Sound programs under section 119 of the CWA, and the Chesapeake Bay program under section 117 of the CWA. Finally, section 319 of the CWA can support programs and projects to reduce runoff that may impact oyster beds.

10.What do you understand to be the consequences of sea level rise, increased storm surge, and warming ocean waters on coastal communities and estuaries?

If confirmed, I would expect to be briefed by staff on the impact sea level rise, storm surge, and warming ocean waters on consequences on coastal communities and estuaries.

58. Following the Sixth Circuit's stay of the Clean Water Rule in 2015 pending further court action, the EPA and Army Corps issued a joint memorandum that states the agencies 1) "look forward to vigorously defending the merits of the Clean Water Rule, which we continue to believe is fully consistent with the law and based on the best available peer-reviewed science," 2) "intend to move forward with measures to improve implementation of the national CWA section 404 program that were announced concurrent with the Rule," 3) will continue their commitment to improve transparency through making section 404 decisions public and making a number of other improvements to the section 404 permit program, 4) strengthen coordination between the agencies, and 5) "work closely with the Department of Justice to ensure [their] actions remain consistent with the stay." If confirmed as EPA Administrator, will you uphold the tenets of this memorandum? If not, what would you change in the EPA's pursuance of clean water and cooperative relationship with the Army Corps of Engineers? Will you commit to working collaboratively with the Army Corps under its corresponding section 404 and other Clean Water Act authorities to ensure clean water for all Americans? If confirmed as EPA Administrator, would you advise DOJ to stop defending the rule and instead ask the court to set aside the rule and send it back to the agencies for reconsideration? Do you disagree with the process the EPA used in developing the Clean Water Rule, which involved incorporating the best available science and feedback received through around 400 public meetings

and over 1 million public comments?

If confirmed I will support efforts of the Corp to improve transparency through making section 404 decisions public and to strengthen coordination between the agencies. However, I do not support the WOTUS rule and do not believe that it is consistent with the Clean Water Act. Accordingly, if confirmed, I will take appropriate steps, in accordance with the Administrative Procedure Act, to withdraw the rule and replace it with a rule that is within the authority granted to EPA and the Corps under the Clean Water Act and is promulgated in compliance with the APA, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, Executive Order 13132 on Federalism, and Executive Order 12866 on regulatory planning and review, procedural requirements that I believe were not met in the promulgation of the WOTUS rule. If confirmed, I also would inform the appropriate courts of these actions.

59. In the wake of SWANCC, Rapanos, and other decisions, how would you shape regulations and internal EPA policy to provide more certainty for regulated parties on how the agency will make section 404 permitting decisions?

EPA does not make 404 permitting decisions. Section 404 of the Clean Water Act grants that authority to the Secretary of the Army, who carries it out acting through the Corps of Engineers. Under section 404(c) EPA has the authority to veto a Corps-issued permit if it EPA determines the discharge will have unacceptable adverse effects. If confirmed, I will seek to clarify when it is appropriate for EPA to use its 404 veto authority.

60.If you choose to pursue a renewed rulemaking to clarify "waters of the United States," will you follow the same procedure and commit to at least the same level of outreach the EPA undertook in developing the Clean Water Rule in developing a new rule?

If confirmed, I will ensure that the outreach performed by EPA is not only extensive, but meaningful.

61.Extreme weather events put water and wastewater infrastructure at risk. In Rhode Island, Super Storm Sandy almost caused Narragansett Bay to breach the water supply for the City of Newport. The March 2010, storms flooded the Pawtuxet River, overtopping the Warwick Wastewater Treatment facility and sending untreated wastewater into surrounding neighborhoods, the River and Narragansett Bay. What do you see as EPA's role in helping cities and towns respond to these increasingly frequent extreme weather events and ensure the safety of the nation's critical water and wastewater infrastructure?

EPA provides water and wastewater infrastructure assistance through the Clean Water Act and Safe Drinking Water Act revolving loan funds and through the new WIFIA loan program.

62.What role can green infrastructure play in helping municipalities manage and prevent sewer overflows and other storm water and wastewater treatment concerns?

Green infrastructure is a neighborhood solution that can help meet national standards.

63.In making recommendations for revisions to state shares of Clean Water State Revolving Fund (CWSRF) money, do you support increasing allocations for states with the oldest infrastructure?

No. I am not aware of any analysis that suggests that age of infrastructure is an appropriate metric that predicts funding needs for wastewater infrastructure. It was not suggested in the May 2016 Report to Congress from EPA on its review of the CWSRF allotment formula, required by section

5005 of the Water Resources Reform and Development Act (WRRDA) of 2014. I also note that the formula is established by law and only Congress can change it.

64.Sea level in Newport, RI has risen over 10 inches since 1930, Rhode Island experiences significantly more rain and more intense storms than in past decades, and Superstorm Sandy and the Flood of 2010 destroyed roads and buildings. The RI Department of Environmental Management is finalizing an assessment of the vulnerability of each wastewater treatment facility in the state from damage due to flooding and storm surge. Will states have the ability to choose to use State Revolving Fund monies to finance resiliency projects under the next Administration? What restrictions, if any, would you foresee putting on the use of these funds for this purpose?

The eligibilities for the use of CWSRF funds are established in the Clean Water Act. If confirmed, I will manage that program as authorized by Congress.

65.States rely on EPA funding, technical assistance, and other resources to help keep the air, water, and soil clean, particularly through the State and Tribal Assistance Grants and Categorical Grants. State agencies like the RIDEM have delegated authority to carry out federal pollution control laws. Based on what you know about the EPA, do you believe states and tribes are getting enough money from the federal government to support clean air and clean water investments and enforcement? If confirmed, will you commit to ensuring states and tribes continue to receive at least the amounts of funding they do now? Are there programs that support states and tribes that you would consider cutting or increasing financial support for?

I support the federalism structure of our federal environmental laws, which includes state delegation or authorization of most programs, and EPA STAG grants to help states implement those programs. If confirmed, I will seek to reduce the workload on states by refraining from adding more and more requirements for them to implement and to instead allow them to focus on implementing core environmental programs relating to air, water, and waste. I am not familiar with the development of EPA's FY 2018 budget so I cannot comment on that proposal, but please be assured that I support funding for states.

66.A 2016 Associated Press study of EPA data identified Providence, RI as “one of the largest [drinking water systems] in the country to exceed a federal lead standard since 2013.” Almost 20 percent of all retail customers’ homes were found to be serviced by utility-owned lead lines. EPA’s lead limit before corrective action is required is currently 15 parts per billion. The city’s water supply was found to be over this limit six times since 2010. Providence’s water hit 30 parts per billion in tests in 2009 and 2013. Providence has shown marked improvement since those peaks, but there is still millions of dollars of investment needed in the city’s drinking water infrastructure to reduce the risk of lead. What role do you believe EPA should play supporting these investments?

I would urge the City to explore funding opportunities available from the new WIFIA loan program, which is implemented by EPA.

67.What have you done in your career to demonstrate lead contamination of drinking water will be a priority if you are confirmed as EPA Administrator? Please cite specific examples.

I am concerned about children’s health, but the Oklahoma Department of Environmental Quality and the Oklahoma Water Resources Board have primary responsibility for implementing and enforcing environmental laws in Oklahoma, so issues relating to lead contamination of drinking water would

fall within their responsibilities. If confirmed as Administrator, I will faithfully execute all environmental laws enacted by Congress, including the Safe Drinking Water Act.

68.In an interview with the Providence Journal last April, Rhode Island's chief of the Center for Drinking Water Quality at the RI Department of Health stated that "[i]n the last monitoring period, we had six small water systems exceed the lead action level. Five were school systems." These systems were brought back into compliance, but the concern remains. How will you prioritize lead abatement in schools and among the most vulnerable populations?

If confirmed, I will fully carry out EPA's authorities, including its authorities under the Safe Drinking Water Act. I note that in the WIIN Act, Congress amended the Safe Drinking Water Act to authorize funding for voluntary school lead testing. If confirmed and if funding is provided, I will carry out that program.

69.EPA's regulations on lead in drinking water, otherwise known as the Lead and Copper Rule, were last revised in 2007. In its October 2016 white paper on revising the rule, the EPA recognized "[t]here is a compelling need to modernize and strengthen implementation of the rule—to strengthen its public health protections and to clarify its implementation requirements to make it more effective and more readily enforceable." Do you agree the Rule is in need of updating to reflect the latest science?

Yes.

70.Do you believe all covered water systems should follow EPA's drinking water analytical methods when testing drinking water for contamination? If so, what efforts will you undertake to ensure all water systems are brought into compliance?

If confirmed, I will fully carry out EPA's authorities, including its authorities under the Safe Drinking Water Act. To achieve this, I will focus on EPA's core missions, such as provision of safe drinking water.

71.In a November 2016 interview with the New York Times, President-elect Trump specifically called out "crystal clear water" as a priority. Do you agree "crystal clear water" should be a priority of the EPA? If so, please list the specific steps you would take as Administrator to make the President-elect's vision a reality.

Yes, I agree that clean water is a priority of the EPA. If confirmed, I will ensure that EPA focuses on the core missions as directed under laws enacted by Congress, including clean water and safe drinking water.

72.Over 40,000 water bodies in the United States are considered "impaired" under Section 303(d) of the Clean Water Act, meaning they do not meet water quality and health standards. Six hundred and thirty-five of these are in Oklahoma. What specifics steps did you take as Attorney General and as a state legislator to improve the water quality in these impaired waters in Oklahoma?

Regulation of water quality in Oklahoma is the responsibility of Oklahoma's environmental regulators at agencies like the Oklahoma Water Resources Board and Oklahoma Department of Environmental Quality. Those agencies would be best situated to describe the actions taken by Oklahoma to improve water quality in impaired waters.

73.What clean water initiatives undertaken by the EPA in the last five years do you support?

I support the Mach 2011 nutrient framework issued by the Assistant Administrator for the Office of Water entitled "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions," which prioritizes state action to encourage on the ground activities over establishment of numeric nutrient limits. I support EPA's May 2012 Integrated Municipal Stormwater and Wastewater Planning Framework, which directs EPA enforcement and permitting officials to allow municipalities to integrate multiple CWA responsibilities in a single plan and prioritize the actions with the greatest health and environmental benefits, and to allow extended compliance schedules to carry out that prioritization. I support EPA's efforts to promote green infrastructure to meet Clean Water Act requirements. Green infrastructure can be a neighborhood solution to meet national standards. I support the new Water Infrastructure Finance and Innovation Act loan program authorized by Congress in 2014 that recently received its first appropriations. The WIFIA program creates tremendous opportunities to increase water and wastewater infrastructure investment because every federal dollar appropriated can leverage as much as $60 in infrastructure investments.

74.How will you address EPA's National Pollutant Discharge Elimination System permitting backlog without undermining any environmental protections or subverting the goals of the Clean Water Act?

First, I would note that at the end of FY 2016, 96.9 percent of Oklahoma's permits were current. Making sure permits are current is one of core functions under the statutory responsibilities given to EPA and in turn carried out by authorized states. However, in recent years states have been asked to shift their focus and resources to other activities. If confirmed, I would return EPA's focus to ensuring that core functions under our environmental laws are carried out.

75.Factory farming of animals is known to cause multiple forms of pollution, such as contaminating local groundwater with nitrates, contributing to hypoxia and "dead zones" in rivers and coastal waters, and releasing the potent greenhouse gas methane. Considering your close ties with the animal agriculture industry in Oklahoma, your previous history of unsuccessfully prosecuting lawsuits against states with animal welfare laws, your opposition of EPA's attempt to conduct a survey of CAFOs, and your pursuit of punitive yet failed investigations of nonprofit advocacy groups working for animal welfare, do you believe you should recuse yourself from any decisions related to enforcing the CWA and CAA to the fullest extent of the law against these facilities? If not, will you commit to disclosing to the EPW Committee any solicitations you have made to interested parties before you make any decisions related to this topic? If not, what assurances can you provide that you will be able to discharge your duties in this area impartially?

If confirmed, I will faithfully execute the Clean Water Act and Clean Air Act as enacted by Congress. My track record with regard to CAFOs, which includes suing a CAFO together with EPA and collecting what EPA at the time said was the largest civil penalty ever assessed against a CAFO for CWA violations, demonstrates that I can, and will, approach such issues with a fair and open mind.

76.Explain your reasons for opposing EPA's 2012 attempt to conduct a survey of CAFOs. Has your thinking changed since then? Please explain why or why not.

For the purpose of this response, I am assuming that you are referring to EPA's 2011 proposed animal feeding operation reporting rule, published at 76 Fed. Reg. 65431 (October 21, 2011), and the January 19, 2012 comments on that proposed rule filed by 12 state attorneys general, including myself. This proposed rule is an example of an attempt to impose new regulatory requirements

without complying with either the law or proper administrative process. Under the Clean Water Act, only facilities that discharge pollutants can be regulated. Despite this limitation on EPA's authority, it had twice before attempted to regulate non-discharging facilities. In 2005, the Second Circuit vacated parts of EPA's 2003 CAFO rule that purported to require non-discharging CAFOs to apply for permits. Waterkeeper Alliance, Inc. v. United States Environmental Protection Agency, 399 F. 3d 486. In 2011, the Fifth Circuit vacated the part of EPA's 2008 CAFO rule that would have required all CAFOs "proposing to discharge" to apply for NPDES permits regardless of whether they had actual discharges. National Pork Producers Council v. United States Environmental Protection Agency, 635 F. 3d 738 (5th Cir. 2011). Further, EPA's authority to require reporting (section 308 of the CWA) applies only to point sources that discharge. That was made clear by the 8th Circuit in Service Oil, Inc. v. Environmental Protection Agency, 590 F. 3d 545 (8th Cir. 2009). Despite the clear limitations of the Clean Water Act, in the CAFO reporting rule EPA proposed to require facilities that are not subject to the Clean Water Act to submit reports to EPA. As such, that proposed rule exceeded EPA's authority.

121.What specific reductions in air, water, or solid waste pollution have resulted from your environmental enforcement actions as Attorney General?

Environmental regulation in Oklahoma is the responsibility of Oklahoma's environmental regulators at agencies like the Oklahoma Department of Environmental Quality and the Oklahoma Water Resources Board. The Office of Attorney General sometimes provides legal services to those agencies with regard to environmental issues, and in that capacity the Office has, for example, negotiated a consent decree requiring a large concentrated animal feeding operation to clean up its operations to prevent water pollution, and negotiated an agreement whereby Arkansas agreed to a stringent phosphorous standard in the Illinois River.

“Waters of the United States” and the Clean Water Rule

February 9, 2017

Overview of Presentation

- **Waters of the US in context**
  - CWA programs
  - Section 404 program
  - Longstanding regulations
  - Legal challenges
- **The Clean Water Rule**
  - Scientific basis
  - Rulemaking process
  - Content of CWR
  - Litigation

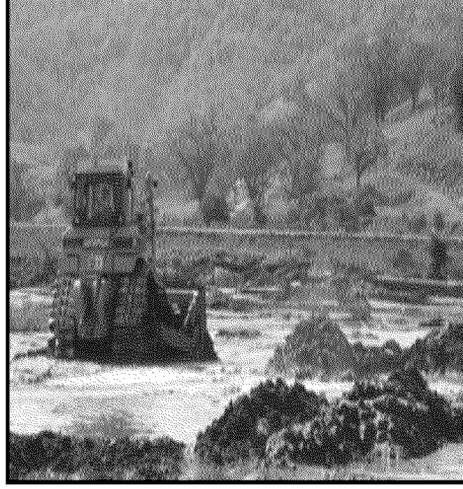
“Waters of the US” and the Clean Water Act

- “Waters of the US” (WUS) is a threshold term under the Clean Water Act (CWA) for the scope of the Act
- CWA programs address “navigable waters,” defined in the statute as “waters of the United States including the territorial seas”
  - CWA did not define WUS; Congress left further clarification to agencies
- EPA and the Army Corps have defined WUS by regulation since the 1970s. The regulatory definition in place before the CWR dates to the mid 1980s and is substantially the same as the 1970s definition
- Two U.S. Supreme Court decisions since that 1980s regulatory definition did not invalidate the definition, but shaped its implementation across all CWA programs

"Waters of the US" and the Clean Water Act, continued

- CWA establishes many programs to protect quality of WUS:
  - Section 303(c): state-developed water quality standards setting waters' quality goals
  - Section 303(d): "Total Maximum Daily Load" (TMDL) plans to bring waters into compliance with water quality standards
  - Section 311: oil spill prevention and clean-up
  - Section 401: state/tribal certification that federal permits and licenses are consistent with CWA and local requirements
  - Section 402: "NPDES" permit program for "end of pipe" discharges of pollutants from sources including factories, sewage treatment plants, and other point sources
  - Section 404: permit program for discharges of dredged/fill material

WUS and Section 404



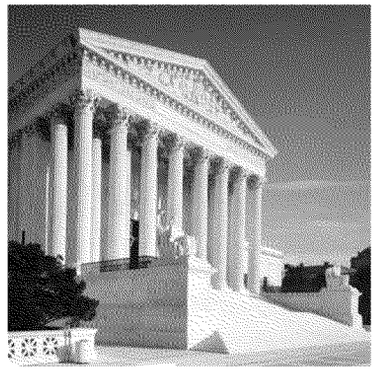
- Same definition of WUS applies to section 404 as other CWA programs
- Since 1972 the Army Corps and EPA have jointly implemented the program to significantly reduce the ongoing loss of wetlands and streams, while authorizing tens of thousands of dredged/fill activities annually
  - Congress tasked the Army Corps with operating the 404 permit program and EPA with developing the environmental review criteria under which permits would be evaluated
  - EPA and the Army Corps have jointly developed the definition of WUS, while EPA has the final policy responsibility for its scope

WUS and Section 404, continued

- The Army Corps makes the vast majority of jurisdictional determinations (JDs)
  - This is in part why WUS issues so often arise in the section 404 context
  - However, court decisions about the scope of WUS also have involved the section 402 NPDES and section 311 oil spill clean-up programs
- Even if dredge/fill discharges are into a WUS, a 404 permit might not be required if activity is excluded under 404(f)
  - For example, discharges associated with ongoing farming activities such as plowing, seeding, and cultivation typically do not need a 404 permit

WUS and its Longstanding Regulatory Definition (dates to mid-1980s)

- This is the **definition in use today** during ongoing litigation over the Clean Water Rule
- **Definition includes**:
  - Waters used/historically used/susceptible to use in interstate commerce
  - Interstate waters and wetlands
  - All other waters … the use, degradation, or destruction of which could affect interstate commerce
  - Impoundments of WUS
  - Tributaries of above waters
  - Territorial seas
  - Wetlands adjacent to above waters
  - Excludes: prior converted cropland, waste treatment systems



WUS at the Supreme Court

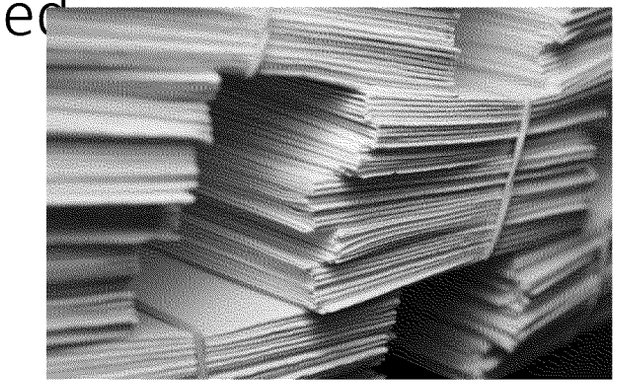
- ***Riverside Bayview*** (1985): Adjacent wetlands to TNWs are properly part of WUS
- ***SWANCC*** (2001): Presence of migratory birds by itself not enough to make "other waters" WUS
- ***Rapanos*** (2006): Tributaries, adjacent wetlands. Split decision on what WUS includes
  - Scalia: "Relatively permanent" or at least seasonal waters; wetlands with a "continuous surface connection"
  - Kennedy: Waters with a "significant nexus" affecting physical, chemical, or biological integrity of downstream waters
  - All: WUS includes more than just waters that are navigable

WUS and Legal Challenges Posed By *Rapanos*

- *Rapanos* has now been interpreted, applied, discussed, or cited in > 130 federal judicial opinions
  - These cases arise in more than 2/3 of all U.S. states
  - U.S. position: water is jurisdictional if meets either the Kennedy or Scalia standards

- All but one U.S. Circuit Courts of Appeal has agreed with U.S. regarding what standard applies
  - Most hold either Kennedy or Scalia standard can be used
  - One held Kennedy standard only
  - None say Scalia standard only

- Supreme Court has rejected all petitions for review



Why Did the Agencies Develop the Clean Water Rule (CWR)?

- The Supreme Court did not invalidate the 1980s definition of WUS, but discussed its limitations and implications
- Many were confused how to implement the unchanged definition in light of the Supreme Court decisions. When was a permit required? Will a case-by-case determination cause delays?
- For more than a decade, EPA and the Army Corps received requests for rulemaking to provide clarity
  - Bipartisan Members of Congress, Supreme Court Justices, state and local officials, industry, agriculture, environmental and conservation groups, scientists, builders and developers, and the public

Why Did the Agencies Develop the CWR? Continued

- The agencies wished to clarify the scope of federal protection for streams and wetlands that form the foundation of our nation's water resources.
  - **People depend on clean water for their health:** About 117 million Americans get at least some of their drinking water from streams that lacked clear protections after *Rapanos*
  - **Our economy depends on clean water:** manufacturing, farming, tourism, recreation, energy production and other major economic sectors need clean water to function and flourish
  - **Recreation and wildlife depend on clean water:** healthy ecosystems provide wildlife habitat and places to fish, hunt, paddle, and swim

CWR: Scientific Support

- The agencies' interpretation of the CWA's scope in the rule is guided by the **best available peer-reviewed science** – particularly as that science informs the determinations as to which waters have a "significant nexus" with traditional navigable waters (TNWs), interstate waters, or the territorial seas
  - Includes the Science Report summarizing **more than 1,200** peer-reviewed, published scientific studies which showed that small streams and wetlands cumulatively play an important role in the health of larger downstream waterways like rivers and lakes
- The **Technical Support Document** utilizes the Science Report and the articles it cites, as well as additional scientific literature to provide the scientific support for the rule
- The **Science Advisory Board** commented on both the Science Report and the proposed rule, concluding that the waters included in the proposed rule was supported by available science and that the agencies could have protected yet more waters

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Scientific Support - SAB Conclusions on Proposed CWR

- SAB states that science **supports the conclusion** that the types of water bodies identified as "waters of the United States" in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters

- Though SAB was supportive of much of the proposed rule, some of their comments **suggested that the proposal could go further** in terms of waters that could be considered tributaries and went too far regarding exclusions
  - Advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks
  - Exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not have scientific justification
  - There is a lack of scientific knowledge to determine whether ditches should be categorically excluded

CWR: Process

- Agencies held two in-person meetings with **small entity** representatives to discuss their thoughts on how to define WUS. Their input is reflected in the CWR and summarized in a report
- Agencies consulted with **state, tribal, and local officials** throughout the process. The CWR reflects their input, which also is summarized in a report
- For example, held in-person meetings and teleconferences with organizations of elected state/tribal/local officials, following up with numerous additional calls and meetings
- Held a series of meetings with the Local Government Advisory Committee

CWR: Process, continued

- Proposed rule subject to public comment May 2014
  - Received 1.1 million comments, about 20,000 unique, in a 207-day comment period
  - Over 400 stakeholder meetings
  - Interagency review
- Final rule signed May 2015, published June 2015, effective August 2015
  - Final ORD science synthesis provided much of the technical basis for the rule
- Sixth Circuit stayed the CWR nationwide pending outcome of litigation in October 2015
  - Agencies using the mid-1980s definition during the stay

CWR: Content

- Bright line: Waters that are WUS
  - Unchanged from 1980s rule: Traditional navigable waters, territorial seas, interstate waters, impoundments of WUS
  - Tributaries, adjacent waters: in 1980s rule but with further definitions
    - Tributary: For first time, CWR defines "tributary" as a water with "bed and banks" and an "ordinary high water mark" that contributes flow, directly or through another water, to a traditional navigable water, interstate water, or territorial sea
    - Adjacent: Existing regulations define "adjacent" as "bordering, contiguous, or neighboring." CWR defines and limits "neighboring" for the first time using floodplain and distance concepts. CWR applies adjacency to all waters, not just wetlands, thereby clarifying status of ponds and lakes adjacent to jurisdictional water.
    - Agriculture: CWR adds for the first time that the agencies will not consider waters "adjacent" that are being used for normal farming, ranching, or forestry activities
- Case-by-Case
  - Specifically identified types of waters, waters within certain distances, and waters within a floodplain of certain jurisdictional waters, must be determined to have a significant nexus to be jurisdictional

CWR: Content, continued

- **Bright line: waters that are <u>not WUS</u>**
  - Retains existing exclusions for prior converted cropland, waste treatment systems
  - Adds new exclusions reflecting public input, such as stormwater management and water recycling systems built in uplands
  - Exclusions for certain ditches, newly added to the regulations
    - Ditches not constructed in streams and that flow only when it rains
    - Ditches not constructed in streams and that have intermittent flow, that do not drain wetlands
    - Ditches not connected to the tributary system
  - Adds new exclusions reflecting longstanding practice, newly added to the regulations, such as irrigated areas that would revert to dry land if irrigation ceased, and farm ponds and other artificial lakes or ponds

Additional information on CWR in Appendix

CWR: No New Permit Requirements for Agriculture, while Preserving Existing Permit Exemptions

Normal farming, silviculture, and ranching practice.

Upland soil & water conservation practice.

Agricultural stormwater discharges

Return flows from irrigated agriculture

Construction/maintenance of farm or stock ponds or irrigation ditches on dry land

Maintenance of drainage ditches

Construction or maintenance of farm, forest, and temporary mining roads.

CWR: Ongoing Litigation

- The CWR is being challenged in the Sixth Circuit Court of Appeals and in district courts
- Issue of "which court has jurisdiction" currently is before the Supreme Court
  - Briefing and further steps in the Sixth Circuit on the merits of the CWR are stayed pending the Supreme Court's decision
  - Decision expected before July 2017
- The Sixth Circuit issued a temporary stay of the CWR in October 2015
  - As a result, agencies are implementing the mid-1980s regulatory definition as litigation proceeds